No. 17303

United States Court of Appeals

For the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,.

BEFORE THE HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S OPENING BRIEF

MARION GARLAND, JR.
Counsel for Appellant.

Office and Post Office Address:
206 Dietz Building,
Bremerton, Washington

DICKSON-FLETCHER BREMERTON, WASH.

ROPOSAL TO LEASE QUARTERS

...al Postmaster General,
Washington 25, D. C.

June 25, 1955
(Date)

The undersigned hereby agrees to lease the premises described below for a term of Ten (10) years from October 21, 1955, or date thereafter of completion of building or any contemplated improvements, additions, etc., but not later than 20 days after acceptance of this proposal by the Post Office Department for the use of the post office at Winslow, Washington at a rental of Fifteen hundred dollars ($1,500.00) per annum, payable monthly and subject to the provisions of form 1400-a which is attached hereto, and which has been carefully read by the undersigned, except that ---:

First floor 26 feet 4 inches by 88 feet 8 inches, providing 2,335 sq. ft. net;
Basement or cellar } --- feet --- inches by --- feet --- inches, providing --- sq. ft. net;

of the one story Concrete Block building known as ---
No. --- Winslow Way Street, lot No. one, block No. None, on the North side of Winslow Way Street, between Bricknell Street and Madison Road Street; on the --- corner of --- Street and --- Street,
in Winslow, Kitsap County, Washington.

Dimensions and location of any additional spaces or adjoining ground areas which proponent agrees to provide:
An asphalt-paved driveway 14' wide on east side of building from Winslow Way, extending to an asphalt-paved area at rear of building, 41' wide by 50' deep, adjacent to a concrete loading apron 10' deep by 27' wide at rear of building, for vehicle access, maneuvering and parking.

I further agree, in consideration of the rental hereinbefore specified:

(a) To furnish satisfactory fuel, heat, light, water, janitor and sewerage service;
(b) To furnish the lawn, fixtures, furniture and safe as listed on Form 1235 (Sheet) (Other new articles and equipment as are included or other appropriate wording)
(c) To furnish the specified toilet facilities, plumbing, heating, and lighting fixtures as listed on Form 1235 (Sheet) per attached addendum
(d) To provide the necessary gas, electric, and water meters;
(e) To equip the premises in accordance with the building requirements as listed on Form 1235 (Sheet) per attached addendum
(f) To furnish ---
(g) To furnish ---

and to keep the premises, and all items listed above in paragraphs (b) to (g), inclusive, in good repair and proper condition, to the satisfaction of the Post Office Department during its occupancy of the premises.

I will have the room or rooms ready for occupancy by the post office on the date specified above as the beginning of the proposed term of lease, provided notice of the acceptance of this proposal by the Post Office Department is promptly received.

SEE ATTACHED ADDENDUM

(SEAL)

/s/ James E. Comrade
(Signature of proponent in full)

/s/ Florence E. Comrade
(Signature of wife or husband, if married, of officer, or member of firm)

(Signature of officer, or member of firm)

P. O. Box 144, Winslow, Washington
(Address of proponent)

Proposal No. 4
(To be filled in by Inspector)

Note.—Wife or husband must join proponent, if married, to subordinate dower rights. If proponent is a municipality, fraternal order, or other corporation, proposal must be signed by the officers authorized by law or by the by-laws of the organization to sign such instruments and must bear the impression of the proponent's seal.

The contractor, in performing the work required by this contract, will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor shall include, in all subcontracts a provision imposing a like obligation on subcontractors.

ACCEPTANCE BY THE GOVERNMENT.

Accepted ---

Signed) Rollin D. Barnard
Assistant Postmaster General.

AUG 10 1955
(Date)

16—81161-8

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STATEMENT OF THE PLEADINGS

United States Attorney on behalf of the post office department, filed a complaint in the Western District of Washington, Northern Division, and secured jurisdiction under 28 USCA 1345 and 28 USCA 2201 (Tr. 4).

The appeal to this court is authorized under 28 USCA 1291. The complaint of the United States post office department and the answer of First Federal Savings and Loan Association of Bremerton are not set out in the transcript. All matters of pleadings and issues were settled by the pre-trial order (Tr. 3 through 19).

STATEMENT OF THE CASE

The post office department, according to Rules laid down by the Postmaster General, was in 1955 and 1956, locating a new post office in Winslow, Kitsap County, Washington (Tr. 5).

There was a bid where persons offered to lease premises meeting the post office department specifications. A Mr. Comrada was the successful bidder for the post office lease (Tr. 5). The subject matter of the lease was a building to be built at an annual rental of $1,480.00 for five (5) years with an option on the part of the post office to renew at an annual rental of $1,320.00 for an additional five (5) years (Tr. 5). Comrada hired Sands to construct the post office building for $22,239.99 (Tr. 8). Comrada and Sands quarreled (Tr. 8 and 9), and took their troubles to court (Tr. 9). Comrada conveyed to Sands the property upon which the post office was being built (Tr. 7).

On July 25, 1956, Sands was the record holder of the title to the property on which the post office building was being built (Tr. 6 and 9).

Sands mortgaged to First Federal Savings and Loan Association of Bremerton, the appellant, the post office property and property adjacent thereto for $21,000.00. Sands needed an additional $8,000.00 to construct the post office (Tr. 6 and 9), and the balance to cover an existing mortgage.

Appellant foreclosed the mortgage and purchased at foreclosure sale on March 25, 1960 (Tr. 3). United States was a party to this suit and moved the case to the Federal court and then asked to be dismissed from the suit (Tr. 7).

On December 1, 1956, the post office began to occupy the post office building, even though the same was not fully completed, and has been in occupancy ever since (Tr. 7). The post office has not had a lease on the premises at any time (Tr. 6 and 42). The post office has not paid or tendered any rent to the appellant (Tr. 8).

At the time the appellant made the loan, they knew a post office building was being built, but were informed by Sands that the post office did not have a lease (Tr. 10 and 11). The appellant did not inquire

of the post office department whether they had a lease on the premises (Tr. 11).

On November 9, 1956, before the post office department occupied the building in any way, they asked the appellant to sign a subrogation of mortgage (Tr. 11). The appellant refused to sign (Tr. 11).

The post office claims its right to possession, because of the negotiations carried on under an agreement executed by the post office and Mr. Comrada on Government Form 1500, known as Exhibit 1 (Appx.). This instrument was not recorded or signed by the appellant (Exhibit 1, appendix).

Under the law of the State of Washington, a lease for a term of years to be valid, must be signed and notarized, otherwise it is a month to month tenancy. *Labor Hall Ass'n, Inc. v. Danielsen*, 24 Wn. (2d) 75, 163 P. (2d) 167. (1945). *Hansen v. Central Inv. Co.*, 10 Wn. (2d) 393, 116 P. (2d) 839 (1941).

The actual rental value of the premises was established by the experts, to be between $250.00 and $330.00 per month (Tr. 95, 116, 129, 135).

Appellant claims that State law applies and there is no lease. The post office department claims that the regulations of the Postmaster General are the law:

that appellant had imputed knowledge of the proposal to lease: that because of said imputed knowledge the appellant is held to the terms of the proposal and must carry out the agreement by entering into a lease at $123.00 per month.

Further, appellant claims that even though there may be a breach of contract on the part of other parties, a court of equity should not specifically enforce to such an inequitable agreement.

The claims of each party are denied by the other party.

ASSIGNMENTS OF ERROR

1. Court erred in applying the federal regulations, rather than the state law.

2. The court erred in making Findings of Fact No. 20 as follows:

> "* * * First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or of a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have

disclosed the interest which the government had in the subject property. Therefore, * * * First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States."

3. The court erred in making Findings of Fact No. 21, on page 40 and 41 of Transcript as follows:

"Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was reasonably available to any properly interested person and could have been secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming."

4. The court erred in making that portion of Findings of Fact No. 22 on page 41 of transcript as follows:

"The proposal to lease quarters as amended and accepted by the government is a valid and enforceable agreement to execute a lease in the future. The terms of such agreement are sufficiently defi-

nite, complete and certain so as to meet the requirements of a contract that may be specifically enforced."

5. The court erred in making Findings of Fact No. 24, page 42 of transcript as follows:

"The government was under no duty to record the proposal to lease quarters agreement and this fact does not impair the government's eligibility for equitable relief in this case."

6. The court erred in making Findings of Fact No. 26, page 42 of transcript as follows:

"First Federal Savings and Loan did not perform their duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security."

7. The court erred in specifically enforcing the contract entered into by Comrada, by requiring First Federal Savings and Loan to execute a lease. The contract was such that the court of equity, should not in good conscience, grant specific performance.

ARGUMENTS

Assignment of Error No. 1.

Assignment of error No. 1 raises a question of state law v. federal rules. The trial court held that the rules of the Postmaster General were to be the law in the case, and that the law of the State of Washington did not apply.

If the Honorable trial Judge erred on this point, the rest of the "Assignments of error" need not be considered.

In the case at bar, the post office relies on Exhibit 1 (appendix), which is an agreement to make a lease. The post office, therefore, has no lease under the Washington Statutes of Frauds, which require acknowledgment.

> "R.C.W. 64.04.010 Conveyances and encumbrances to be by deed. Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: * * * ."
>
> "R.C.W. 64.04.020 Requisites of a deed. Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party * * *."
>
> "R.C.W. 59.04.010 Tenancies from year to year abolished except under written contract. * * *

Leases * * * shall be legal and valid for any term or period not exceeding one year, without acknowledgment * * *."

Hanson v. Central Inv. Co., 10 Wn. (2d) 393, 116 P. (2d) 839 (1941), page 394 is as follows:

* * *

"(1) The only question presented upon this appeal is whether the modification agreement should have been acknowledged before a notary public. Rem. Rev. Stat., P 10618 (P.C.P. 3553), provides that leases "shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses, or seals."

In the case of *Omak Realty Investment Co. v. Dewey*, 129 Wash. 385, 225 Pac. 236, it was distinctly held that a lease of real estate for a period longer than one year, unacknowledged, only created a tenancy from month to month, *and that the same rule applied to a contract to execute a lease.* The present case is controlled by the holding in that case." (Italics mine)

The Federal law granting power to the Postmaster General is set forth in 39 USCA 794f:

"794f. LEASES, DONATIONS, AND REWARDS:

In the performance of, and with respect to, the function, powers and duties vested in him, the Postmaster General may —

(1) Enter into such leases of real property as may be necessary in the conduct of the affairs

of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, * * *."

In deciding on the question of state law v. Federal departmental rules, Judge Lindberg adopted the reasoning of the Ninth Circuit in *U.S. v. View Crest Gardens*, 268 Fed. (2d) 380 (1959).

The question there involved was Federal FHA rules vs. State law as to the appointment of a receiver pending mortgage foreclosure. The regulation of FHA allowed a receiver and State law did not. This Ninth Circuit reasoned on page 382 as follows:

"* * * But we do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838; *United States v. Allegheny County*, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed, 1209; *United States v. Matthews*, 9 Cir., 1957, 144 F. 2d 626; *McKnight v. United States*, 9 Cir., 1958, 259 F. 2d 540. Cf. *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93. It is therefore equally clear that if the law of the State of Washington is to have any application in the foreclosure proceeding it is because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal

policy. As it is made certain in the cases just cited, this action arises under federal law, and not as an action between persons of diverse citizenship, hence the rule of *Erie R. Co v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 is inapplicable. Nevertheless state law is sometimes adopted to fulfill the federal policies involved. As the Supreme Court of the United States stated in *Clearfield Trust, supra*, 'in our choice of the applicable federal rule we have occasionally selected state law.' But not when 'the desirability of a uniform federal rule is plain.' 318 U.S. at page 367, 63 S. Ct. at page 575."

A case reaching a different conclusion applying the principles of law is *United States v. Brosnan, and Bank of American National Trust and Savings Association v. United States*, 80 Supreme Court Reporter, page 1108 (July 1960). The question in the Brosnan case was whether state or federal law should apply in determining the validity of a state mortgage foreclosure over a federal tax lien. This case involved a combined appeal to the U.S. Supreme Court from the Ninth Circuit and from the Third Circuit.

The court reasoned as follows on pages 1111 and 1112:

"(5, 6) We nevertheless believe it desirable to adopt as federal law state law governing divesti-

ture of federal tax liens, except to the extent that Congress may have entered the field. It is sure that such liens form part of the machinery for the collection of federal taxes, the objective of which is 'uniformity, as far as may be.' *United States v. Gilbert Associates*, 345 U.S. 361, 364, 73 S. Ct. 701, 703, 97 L. Ed. 1071. However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule. *Cf. Board of Com'rs of Jackson County v. United States*, 308 U.S. 343, 60 St. Ct. 285, 84 L. Ed. 313.

III

(7) This conclusion would not, of course, withstand a congressional direction to the contrary."

I would paraphrase the present state of the law as follows: If Congress has not decreed otherwise, the federal court shall apply state law or federal law, depending on whether "established property rights" or the federal "government's desirability for uniformity" would do the most justice in each individual case.

Applying the facts of the case at bar to the above law, we find that Congress in delegating authority to the Postmaster, 39 USCA 794f, let him make "terms" of "leases" without regard to any law, but did not give him authority in making rules to abandon the formalities of leases as required by state law. The Postmaster can make leases embodying such terms as he sees fit, but he still is not specifically given the authority to ignore the requirements of instruments that are executed to carry out these terms.

Since Congress has not directed the Postmaster to ignore state requirements of leases and his rules have done so, this court must decide whether the government's "desire for uniformity" or "state laws of property" would be the best to apply in this particular case.

The facts to which the law is to be applied are:

Van Buskirk, a real estate manager for the post office (Tr. 6), testified that agreements such as Ex-

hibit 1, were used in all states (Tr. 5), and that at the present time about 600 to 1,200 such proposals are used a year (Tr. 66). In 1956, at the time the appellant took its mortgage, there were ten such agreements in the whole United States (Tr. 78). There had been before this time, one in the State of Washington (Tr. 79). There was the further fact that some occupancies of post offices were month to month tenancies, with no leases or such agreements as Exhibit 1. (Tr. 80).

This court can take judicial knowledge of the thousands of leases that are executed in each state each year and the fact that title companies, banks and all other dealers in real property, look to the law of the state to determine the validity of the instruments with which they deal.

The post office does an infinitesimal small part of business, yet they submit this small amount of business need not conform to state laws in the expediency of uniformity. Everyone must read their rules and forms and comply with them.

The post office is only one branch of government. If its agreements need not comply with state law then neither must any of the agreements of the hundreds of other departments of government. No one should

be put to the burden of knowing the rules of each government department when they deal in leased real property.

It is up to this court to determine whether this hardship is of greater weight than the desirability of uniformity on the part of the government.

ARGUMENT OF ASSIGNMENTS OF ERROR 2, 3, 4 and 6

These assignments all pertain to Findings of Fact and Conclusions that First Federal Savings and Loan Association of Bremerton, the appellant, had implied knowledge of the agreement (Exhibit 1) to make a lease. It is admitted that there was no actual "knowledge and no recording of the instrument." (Tr. 39)

If state law prevails over federal rules in this case, the assignments 2 through 7 are no longer of importance. The knowledge it is alleged the appellant had, was knowledge of an instrument which was not enforceable as a lease under state law.

However, even if the federal rule prevails, the instrument (Exhibit 1) would only be binding on the appellant if the appellant had actual or implied knowledge of the instrument when they made their mortgage. *Holsell v. Renfrow*, 207 U.S. 287 (1906).

The knowledge that the appellant had, is well set out in the admitted Facts No. 25 and 26 (Tr. 9 and 10), as follows:

> "25. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 9 of Admitted Facts herein referred to as the post office property in the amount of $8,000, from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was $12,454.12 on the adjacent "restaurant property." The loan application was amended to provide for a loan of $21,000, to be secured by the mortgage of both the restaurant and post office property, and that $12,454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property.
>
> In the loan application the improvements located on the real estate were designated as a restaurant built in 1955, and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that $8,454.88 of the loan proceeds were to be used for "completing building the above-described post office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of $375.00 per month,

*but that there was no lease of the adjacent post office property.** Mr. Paul Rosenbarger, president of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property. (*Italics mine)

* * *

> A post office, 27 feet by 74 feet, which improvement was appraised at $16,453 (when completed).

The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal resport.

First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department had a lease agreement prior to accepting the loan.

First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands, dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (Policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that the building under construction was to be used as a post office.

> 26. On or about November 9, 1956, the defendant First Federal Savings and Loan Association of Bremerton, was requested to sign a form acknowledging that the mortgage of July 25, 1956, executed by Sands, was subordinate to the lease of the Post Office Department. The First Federal Savings and Loan Association of Bremerton declined to execute the subordination agreement.

There were other post offices in the area, which were not under leases (Tr. 62, 79 and 80).

The Findings of Fact which I have excepted to, might be construed as Conclusions of Law, as they are the interpretations put on the facts which were admitted in the Admission of Fact.

The rule that the trial court saw the witnesses and heard the testimony, is not brought into play in this case, because the facts are under a pre-trial order of Admission of Fact. Knowing that the trial court saw the witnesses does not affect the Admission of Fact in any way.

This court can interpret the facts and draw its own Conclusions, as well as the trial court. The rules pertaining to this set of facts is as well set forth in *Diimel v. Morse*, 36 Wn. (2d) 344, 218 P. (2d) 334 (1950), quoted on page 347:

"* * * An encumbrancer, without notice of existing equities, may rely on the record chain of title, and, in the absence of notice, is not bound to go outside the records to inquire about them. *Burr v. Dyer*, 60 Wash. 603, 111 Pac. 866.

* * *

(5) We are satisfied that the evidence in the record clearly preponderates against the finding that Welch's attorney was also the agent of Kafflen. He represented Welch only. Kafflen may have been extraordinarily credulous, but notice of things he did not know will not be imputed to him on the basis of the knowledge of Welch's attorney. *Kafflen was on the premises, but he was not required to inquire of the tenants concerning the title of the property. Rehm v. Reilly*, 161 Wash. 418, 297 Pac. 147, 74 A.L.R. 350." (Italics mine).

Also the case of *Burgess v. Independent School District No. 1*, Okl. 336 P. 2d 1077 (1959) as follows:

"(8, 9) The trial court having determined, in effect, that defendant school district made a diligent inquiry and such finding having been by us approved, such defendant is to be regarded as having acted bona fide and without notice of the interests of the plaintiffs in the land in controversy.

"When a person has notice of circumstances which put him upon inquiry, and he actually makes due inquiry into the circumstances and either fails to discover the existence of any rights in conflict with his own or becomes satisfied that

the suspicions which have been awakened are unwarranted, or that a change in the circumstances has obviated the grounds of his apprehension, he is to be regarded as having acted bona fide and without notice of the fact. * * * "

— 66 C.J.S. Notice P 11, p. 645.

"The presumption or implication of notice, based upon the rule heretofore stated that notice of facts putting one on inquiry is notice of the facts which such inquiry would have revealed, is not a conclusive one. If it appears that the person sought to be charged with notice was not heedless of the warning signals, but made inquiry and used due diligence to discover the facts which were suggested by the facts of which he had knowledge, and yet failed to obtain knowledge thereof, the inference of notice is rebutted and he is not affected thereby."

— 39 Am. Jur. Notice, P. 14.

"It is as well established, as it would seem to be apparent, that diligent but fruitless investigation into the existence of the facts concerning which one is put upon inquiry places the unsuccessful questant once more in the position of immunity from notice. In the language of Judge Selden in a leading case (*Williamson v. Brown*, 15 N.Y. 354):

" 'The phraseology uniformly used, as descriptive of the kind of notice in question, sufficient to put the party upon inquiry, would seem to imply that if the party is faithful in making

inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice?'

"Hence an instruction that one is affected with notice if he has knowledge of facts sufficing to put him on inquiry is erroneous for its failure to discover the effect of inquiry honestly and efficiently prosecuted. The therapeutic powers of diligent research are unimpaired by the facts that the information received was inaccurate or that the informant did not possess complete information concerning the motive for the interrogation. As a corollary, even though no inquiry be made, if in fact it would have been fruitless, notice does not arise from the knowledge of inquiry-provoking circumstances.

Actually the knowledge that the appellant had was that a building was being built for occupancy by the post office. That the owner of the building stated truthfully that there was no lease. The title insurance company searched the record and found no evidence of a lease. There were many tenancies in the area where the post office did not have a lease. (Tr. 62, 79, 80 and 97).

There was a building being built which was going to have two occupants. One had given notice of his lease and the tenant and landlord acknowledged that

there was a lease. Why should a person making a loan go beyond the record and the word of a landlord, when there is no one in possession, nothing to show that the post office department would, in fact, ever occupy the premises, even though it was being built for post office occupancy.

It is up to this court to decide what is reasonable business procedure for a financial institution.

I submit that the only way to do this is to search the record and inquire of the people in possession and not to look up any person for whom the building might be suitable for occupancy. This puts an unreasonable burden on the financier.

ARGUMENT AS TO ASSIGNMENT OF ERROR No. 5 and 7

This argument is that a court of equity, should not specifically enforce an agreement against a person not a party to the agreement when the equities are as hereinafter set forth.

First, before the post office moved into the premises being leased, it knew of the appellant's mortgage on the premises and asked that the appellant subrogate its mortgage (Tr. 11).

This the appellant refused to do. Even so, the post office department went into possession, knowing these facts (Tr. 7). The post office knew that they were securing a rental for the premises at $123.33 per month, which is not enough to even pay the interest on the loan, pay the taxes, insurance and upkeep and does not even commence to amortize the loan (Tr. 100). A reasonable rental would have been somewhere between $250.00 and $333.00 per month (Tr. 116, 129 and 135).

Mr. Comrada who made the lease was so ignorant of business, that he first had a lease for $1,500.00 a year and could not finance the building, so the post office talked him into a $1,480.00 lease with a five (5) year option at $1,320.00 (Tr. 71 and 72).

The post office does not have any other lease at so low a figure when compared on a square foot basis. This agreement is $0.71 per annum per square foot and all other comparable post offices are from $0.94 to $1.31 a square foot. (Tr. 143 and 144 and Exhibit 1)

There is no allegation of fraud. There is a dealing by the post office through its regional estate manager (Tr. 61), whereby he secured an unfair lease (Tr. 95, 116, 129 and 135) from a poor business man as lessor (Tr. 71, 72). The post office had an unrecorded

instrument that is not a lease, on post office form (Tr. 11 and Exhibit 9), and went into possession knowing that the appellant had a mortgage on the premises that the appellant would not subrogate to the post office's alleged lease (Tr .11).

The appellant inquired of the lessor if there was a lease and examined the premises (Tr. 10), and secured title insurance (Tr. 11). There were other post office occupancies in the area without a lease (Tr. 97, 79 and 80).

A recent Washington case, *John M. Nelson, et al., Appellants, v. Dorothy Frieda Nelson, Respondent,* 157 Wash. Decisions Advance Sheet. (No Pacific citation available)

> "* * * Against the trial court's conclusion that this contract was unconscionable and should not be enforced, the plaintiffs argue that they are entitled to a decree of specific performance, as a matter of right, since there is no fraud or fiduciary relationship established. It is urged that the earnest money receipts are clear and unambiguous; that the defendant could not have been misled thereby, and that no more is involved here than an attempt by the defendant to repudiate a bad bargain.
>
> "We are, however, convinced that there is more involved than a bad bargain. Not only was there

a misunderstanding by the defendant, as to the amount of her equity in the Boyston Avenue propperty, but there was an 'overkeenness' (a most expressive word cribbed from *Kirkpatrick v. Pease* (1907), 202 Mo. 471, 101 S.W. 651) on the part of the plaintiff Levy, whetted by his expressed intention 'to get even with' the defendant.

* * *

"In *Gilman v. Brunton* (1916), 94 Wash. 1, 161 Pac. 835, the trial court had, as here, dismissed an action for specific performance. We affirmed, saying, inter alia (p. 8):

'Nor can it be said that respondents are estopped by their examination of the lands to deny appellant's right to specific performance. This is not a case of rescission of an executed contract, in which courts are slow to grant relief where the proof of fraud is not clear and convincing and the complaining party has already consummated the contract after an inspection of the land. It is a case where resort is had to a court of conscience to enforce performance of an executory contract which would impose an inequitable burden upon one of the parties. If the contract is shown to be unconscionable, inequitable and unfair, it is the duty of the court to deny enforcement, although the evidence might not be sufficient to justify rescission in the case of an executed contract. Taking the evidence most favorable to the appellant, it discloses that he is seeking to compel respondents to pay for property more than $3,000 in excess of its fair value. Even if there

may not have been actionable fraud on the part of appellant, still a court of conscience will not lend its aid to the enforcement of a contract which is manifestly unfair. If the appellant deems himself injured, there remains to him his remedy in an action at law for damages for breach of contract. The law on this subject is well expressed by one of the standard text books as follows:

"'So a court of equity will not lend its aid to enforce a contract which is in any way unfair, inequitable or unconscionable. And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance even though there is no such fraud or the like as would require a cancellation. The contract may be perfectly legal, and yet it will not be specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties.'"

* * *

" A multiplicity of support citation adds little to a case of this character, for, as we said in *Voight v. Fidelity Inv. Co.* (1908), 49 Wash. 612, 614, 96 Pac. 162 (another case in which we affirmed the trial court's refusal to grant specific performance).

'. . . the decision of controversies of this character must of necessity depend largely upon the circumstances surrounding each particular case. The cases are of equitable cognizance and the rules governing them must be more or less flexible...'"

On the above facts and law as we see it, a court of equity should not specifically enforce this contract against the appellant. There may be a breach of contract according to law and the post office entitled to an award for damages from other parties, but equity should not step in and enforce an inequitable contract.

CONCLUSION

State law should apply to the laws governing the form of leases. These laws are fundamental to property rights. The post office department through its rules should not change requirements as to leases and render useless all accepted means of getting good security on property.

Second, when the appellant has had a title search and examined the premises and found no one in possession (but did find a building suitable for a post office) and inquired of owner as to a lease, it should not be said to have imputed knowledge of an unrecorded instrument, that if specifically enforced would lead to the execution of a lease.

Lastly, a court of equity should not specifically enforce contracts against third parties in such inequitable circumstances.

Respectfully submitted,
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